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Court Case Will Not Affect Montana DBE Program

Several inquiries have been received regarding the effect of the recent Supreme Court decision on the DBE program in Montana.

According to Phillip D. Brady, General Counsel for the U.S. Department of Transportation, the City of Richmond v. J.A. Croson Company decision does not apply to disadvantaged business enterprise programs which were established by Federal statute.

Under the Croson decision, state and local governments intending to establish set-aside programs for minority businesses under their own legal authority may find it necessary to establish a record of discrimination in the past affecting business opportunities for minority firms. The state and local governments may also find it necessary to tailor the remedies established to the discrimination that is found. The decision does not mandate a similar process for implementation at either the Federal or state and local level of a DBE program established by Federal statute.

The Montana DBE program administered by the Department of Highways is mandated by Federal statute.

1990 Montana Bid Lettings

The Montana Highway Commission has approved the following bid letting dates for 1990.

January 25, 1990	February 22, 1990
March 22, 1990	April 26, 1990
May 24, 1990	June 28, 1990
July 26, 1990	August 23, 1990
September 27, 1990	October 25, 1990
December 6, 1990	

1990 Bid Letting Dates

Following is the 1990 schedule of bid lettings for North Dakota, South Dakota and Wyoming.

North Dakota

January 26, 1990	February 16, 1990
March 23, 1990	April 20, 1990
May 25, 1990	July 27, 1990
September 21, 1990	November 9, 1990

South Dakota

January 17, 1990	February 6, 1990
February 22, 1990	March 13, 1990
*April 4, 1990	April 24, 1990
May 15, 1990	*June 6, 1990
June 26, 1990	July 18, 1990
August 15, 1990	September 19, 1990
October 16, 1990	November 13, 1990
*Tentative Date	

Wyoming

January 17, 1990	February 15, 1990
March 8, 1990	April 20, 1990
May 10, 1990	June 7, 1990
July 12, 1990	August 16, 1990
September 13, 1990	October 11, 1990
November 8, 1990	December 13, 1990

***WE WISH ALL OF OUR CONTRACTOR
FRIENDS A PROSPEROUS 1990***

PLEASE RETURN

The Civil Rights Newsletter is published on a quarterly basis by the Montana Department of Highways' Civil Rights Bureau.

Raymond D. Brown, Chief
Civil Rights Bureau
(406) 444-6333

Vicky A. Koch
EEO Program Officer
(406) 444-6335

Rich Munger
DBE Program Specialist
(406) 444-7609

Sam Prestipino
Compliance Specialist—Labor Compliance
(406) 444-6334

Misty Hammerbacker
Program Specialist
(406) 444-6337

Debbie Johnke
Program Assistant
(406) 444-6332

Change of Address

Big Z, Inc., a certified DBE has moved their office and shop to 2701 Harnish Blvd., Billings, MT.

The new mailing address and telephone number are:
Big Z, Inc., P.O. Box 80805, Billings, MT 59108.
Phone: (406)652-8115.

Omo Construction, Inc. and Big "O" Construction & Supply, have moved to 445 Sugar, Billings, MT. 59101.

The telephone number and mailing address remain the same as published in the October issue of the DBE Directory.

Partners, Inc., dba T.P. Partners, Inc. has a new address and phone number, as follows: Partners, Inc., Box 731, Lame Deer, MT 59043, Phone: (406)477-8394.

The firm can also be contacted through the address and phone number listed in the current DBE directory.

Telephone Changes

The following certified DBE firms have changed their telephone numbers.

BAC-CO, Wolf Creek, MT. Phone: (406)235-4265
Alexander-Martin, Inc., Jerome, ID., Phone: (208) 324-2300

Montana Department of Highways Contractor Information

The Montana Department of Highways (MDOH) has unveiled a system whereby contractors can access the MDOH computer system for the purpose of securing contractor information. The current menu consists of (1) The Planholders list and (2) The "as read" bids on projects. The information would be for the current letting.

A modem attached to your computer by cable or installed internally, a telephone line to the modem, and a software package are needed to access the system. General information is shown below.

Plans call for other information to be available in the future. Letting lists, bid tabulations, addendums and plan ordering are being considered. Details for using the system as it now exists are available from MDOH User Support Unit. Ask for Dave or Cathy at (406)444-6311.

Modem/Communications General Information

A. Modems

A number of different brand name modems exist. However, you will need one that is Hayes compatible. Some familiar brand names are:

Hayes, Maxon, and Packard Bell.

Baud rate transmission speed allowed in a minimum of 1200 and a maximum of 2400 baud. Our experience has been that the best transmission is at 1200 baud, however, if you use 2400 baud without errors continually occurring, then do so.

Modems may be purchased at your local computer center (Computerland, etc.), or at other stores such as Radio Shack. They run anywhere from \$150.00-500.00 for an average modem.

B. Communications Software

A number of different communication packages exist. We support only XTALK as we have found it to be the best for our purpose.

XTALK, or other packages, can also be purchased at your local computer center store. Prices vary depending on the package.

C. Other

An ASYNC PORT must reside on the personal computer along with a SERIAL/RS232 Cable. A serial cable costs approximately \$15.00

1990 Contractor Workshops

For the 1990 construction season, the Civil Rights Bureau (CRB) will hold contractor workshops. The scheduled dates are:

February 27, 1990	Missoula	Holiday Inn	200 S. Pattee
March 6, 1990	Great Falls	Vo - Tech	2100 16th Ave. S.
March 13, 1990	Billings	Career Center	415 N. 30th

Contractors, supervisors, EEO officers and office personnel should consider attending.

The sessions will be from 8 a.m. to 12 noon. The topics to be discussed will be:

The New Training Programs

Contract Compliance Reviews

Labor Compliance

DBE Program Revisions

Questions or comments concerning the workshops should be directed to Sam Prestipino at 444-6331.

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OSHA Lists Top 10 Violations

The Occupational Safety and Health Administration (OSHA) cited 18,163 nationwide employers between October 1, 1987 and September 30, 1988 for non-compliance to the agency's Hazard Communication Standards. Penalties hit the \$1 million mark. Listed below are the top ten violations. The Administration reports that the first four provisions are the ones that employers are having difficulty complying with.

1. The most frequently cited section requires employers to develop, implement and maintain a written hazard communication program for the worksite.
2. The next most frequently cited violation requires employers to provide workers with information and training on hazardous chemicals in their work area when they first begin their jobs and whenever a new hazard is introduced into the work force area.
3. The third is a requirement which states that employers must label hazardous chemicals regulated under substance-specific standards.
4. And, number four is a requirement that chemical manufacturers and importers develop material safety data sheets and that employers have data sheets for each hazardous substance they use.
5. Failure to maintain copies of MSDSs in the workplace and readily accessible to workers.
6. Failure to label, mark or tag each container of hazardous chemicals in the workplace with appropriate information.
7. Failure to provide MSDSs that are in English and contain certain identification and hazard information.
8. Failure by chemical manufacturers, importers or distributors to label, mark or tag chemical containers leaving the workplace with appropriate information.
9. Removing or defacing existing labels on containers entering the worksite.
10. Failure by chemical manufacturers, importers or employers that evaluate chemicals for hazards to have written procedures indicating the procedures they use.

Excerpt from the October 1989 Montana Contractors' Association, Inc., Newsletter.

Cash-Flow Manual

The American Subcontractors Association Manual, IMPROVING CASH FLOW: a GUIDE FOR SUBCONTRACTORS, may be obtained from them at 1004 Duke Street, Alexandria, Virginia, 22314-3512. The cost is

\$18.00 to members of ASA or \$22.00 to non-members, plus \$3.00 for shipping and handling.

The manual contains information on handling such common collection problems as broken customer-payment promises, short payments, unexplained payment reduction, unpaid change orders, back charges and retainage as well as advice on other aspects of cash flow and collections.

Montana DBE Firm is Regional Minority Small Business of the Year

D.M. Gray Company, Inc. of Great Falls was recently selected as the minority business of the year for Federal Region VIII by the Small Business Administration. Region VIII consists of Colorado, North and South Dakota, Utah, Wyoming and Montana.

D.M. Gray, Inc.- a Native-American owned firm-specializes in commercial, single family residence, underground utility and steel fabrication construction.

The company had only one employee when it began five years ago. At the time of its entry in the SBA 8(a) program in 1984 it had three employees; today there are 45, over half of whom are Native-Americans. Annual sales then were \$19,000, today they exceed \$1 million. With the help of a \$1.8 million SBA-backed surety bond limit, D.M. Gray has successfully broken out of the Catch-22 situation of having needed bonding contingent on financing, which is difficult to get without a track record.

Darryl M. Gray is the President of the firm.

1990 Annual EEO Submissions

If you are currently working as either a prime or subcontractor on a Montana Federal-aid highway construction project and are continuing into the 1990 construction season, your annual EEO submission must be submitted and approved by this office prior to beginning work in 1990.

Information pertaining to the content of the Annual EEO Submission is contained in the Civil Rights Bureau Manual in Section I.B - EEO Contract Compliance on page I.B. 26. Samples of the forms are located in Section I.C. - EEO forms on pages I.C. 11 - 15.

If you have any questions pertaining to EEO Contract Compliance, call (406)444-6331.

Montana Small Business Development Center

Program Review for Prospective Clients

SBDC Subcenter, Dawson Comm. College
P.O. Box 421
Glendive, MT 59330
(406)365-2377

SBDC Program Center, Dept. of Commerce
1424 Ninth Ave.
Helena, MT 59620
(406)444-4780

SBDC subcenter, Flathead Valley Community College
#1 First St. E.
Kalispell, MT 59901
(406)752-5222

The Small Business Development Center (SBDC) is a unit of the Montana Department of Commerce Business Assistance Division. The SBDC is jointly funded by the Montana Department of Commerce and the U.S. Small Business Administration.

Purpose:

The Small Business Development Center provides management training, consulting and information to small businesses in finance, marketing, international trade, business information systems and government contracting.

Management Problems The SBDC Can Help With:

Finance: Record-keeping, manufacturing cost accounting, financial management, financing proposals, business plans.

Marketing: Industry studies, market identification, finding agents and distributors, getting into trade shows.

International Trade: Customs and tariffs information, foreign market information, foreign product specifications.

Government Contracting Getting on bidders' lists, military product specifications, record-keeping and quality control.

Data/Information Systems: Online data searches, choosing business computer systems, using personal computer software for records, control and financial management.

Offices and Staff:

The SBDC opened a Program Center in Helena and an Eastern Montana Subcenter at Dawson Community College in Glendive in June, 1988. In October, 1988 they added a Northwestern Montana Subcenter at Flathead Valley Community College in Kalispell. The staff includes a director and consulting specialists in finance, international trade and information/data systems at Helena; a second finance officer and an agri-business marketing officer at Glendive; and a Subcenter director specializing in management training programs at Kalispell.

Fees:

SBDC consulting services are free of charge. They offer management training on a cost-recovery basis. Typical fees for a full-day course run between \$25 and \$45.

Interagency Cooperation:

The SBDC works with Business Assistance Division, the SBA, SCORE, local development groups, and the University System to get clients the fastest and most expert help available.

Statewide Coverage:

With its offices in Glendive and Kalispell, the SBDC has a strong rural focus, giving the state's business assistance programs a real presence in eastern and northwestern Montana. The consulting officers are "circuit riders," spending a minimum of three days per week on the road, traveling throughout the state to meet clients in their home communities. They present management training programs statewide, offering an average of 25 seminars in 12 different communities during every calendar quarter of the year. The SBDC Training Calendar is available from their offices, or from your local Chamber of Commerce or Economic Development Corporation.

Questions and Answers About SBDC Assistance:

Who is eligible for SBDC services?

The SBDC can assist any small business or prospective (start-up) business in Montana. Over 98% of all Montana firms qualify as "small" businesses by the SBA's definition. They help every kind of business: retail, services, manufacturing, etc.

How do I apply for SBDC assistance?

Just call the nearest SBDC office and ask to speak to an officer. If you tell them what area you need help with,
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such as finance or government contracting, they can assign an officer with that kind of experience.

What can I expect when I call the SBDC?

Usually, the first thing their officers ask for is information on your business or project--financial history, project description or business plan. They can send you outlines of business and marketing plans, and identify sources of information to answer any questions. After reviewing your project, an officer will arrange to meet you for personal consulting.

Will the SBDC write my business or marketing plan?

No. They can advise and assist their clients in preparing plans and proposals, offering personal counseling, customized outlines, and market, industry, economic and demographic information. "Turnkey" plan-writing services would be impossible with their small staff; and it's usually best in any case for clients to produce and understand their own business and marketing plans.

Can the SBDC give me a loan?

The SBDC has no loan funds of its own, but their finance officers work on a daily basis with banks and other lenders, and the Montana State Investments Division. They can help you package and present a professional and powerful loan proposal.

What kind of education and experience do SBDC counselors have?

Counseling specialists at the SBDC and Business Assistance Division are required to have at least a college degree and five years of employment experience in their field of specialty. In fact, their counselors typically exceed those requirements. Most of their people have owned and operated their own businesses, and have spent the major-ity of their carriers in the private sector. They don't just talk business. They've been there.

How does the SBDC decide how much time to spend with a client?

That decision is pretty simple: They work with those who work with them. In an ongoing project, after every meeting with an officer, you'll usually be left with some homework (information to gather, agencies to contact, or the like). When clients "do their homework" and keep in contact, they keep working with them if the project is at all feasible. On the average, SBDC counselors spend five hours of direct contact with each of their clients during a three-month calendar quarter.

What if the SBDC doesn't have a specialist in my problem area?

If their officers can't answer your questions, they can almost always find someone who can from the many

business resources in the State (SCORE, the University of Montana Small Business Institute, Cooperative Extension Service, private consultants, etc.). One call to them puts you in touch with all these resources.

What about government grants for starting businesses?

For all practical purposes, there is no such thing as a "grant for starting a business".

Federal programs, such as the Small Business Innovation Research Program (SBIR), do offer contracts to qualified companies responding to requests for proposals on specific technical research questions. They can provide information about such programs.

The Community Development Block Grant Program (CDBG) makes grants to cities or counties for the purpose of lending to businesses that are expected to create low-to-middle income jobs as a result of the loan. The funds are a loan, not a grant to the company, and must be repaid.

SBDC counselors are experienced with the CDBG program, and can advise whether your project might be suitable.

What kind of information is available?

The SBDC has several publications, available on request, to explain state and federal business assistance programs and provide guidance on exporting and on contracting with state and federal agencies. Business and marketing plan guides and outlines are available, from two-page outlines to a 150-page text. Special market studies for certain industries are available at prices from \$50 to \$100. SBDC's Data Officer can help with text and online searches for specific industry, economic and demographic information; and military product specifications are available through their relationship with the University Technical Assistance Program at Montana State University.

How can I, and my community, learn more about the SBDC program?

Their counselors will gladly respond to requests for personal meetings, or invitations to speak before your civic, business or educational group.

There is much more to the SBDC program than can be explained in this brief space, but they are prepared to help insure that Montanans understand and take advantage of the resources that the SBDC offers.

Small Business Development Center Specialists:

Helena: 444-4780

Finance/Gov't Procurement: Gary Faulkner

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MT SBDC, continued from page 5

International Trade: Matthew Cohn, John Maloney
Data Systems: David Elenbass
Marketing: Gene Marcille, Jim Burns - (Business Assistance Division)

Glendive: 365-2377
Finance: Rod Jorgenson
Marketing: Gary Mariegard

Kalispell: 752-5222 Management Training: Tom Jay

Dept. of Administration Invitation For Bid

Scaled bids will be received until 2:00 PM on January 18, 1990, and will be publicly opened and read aloud in the offices of the Architecture & Engineering Div., 1520 East Sixth Ave., Helena, MT for

**WOODSIDE BRIDGE FISHING ACCESS SITE,
NEAR HAMILTON, MONTANA, MONT A/E 87-35-
15-09**

Scaled bids will be received until 2:00 PM on January 25, 1990, and will be publicly opened and read aloud in the offices of the Architecture & Engineering Div., 1520 East Sixth Ave., Helena, MT for

**PAINT FIRE-RETARDANT COVERING ON
CORK CEILING TILE, DEPARTMENT OF INSTI-
TUTIONS, MONTANA STATE HOSPITAL,
GALEN, MONTANA, MONT A/E 89-11-04RM.**

Bids shall be submitted on the form provided with the contract documents. Contract documents may be secured at the office of the Architecture & Engineering Div., 1520 East Sixth Ave., Helena, MT.

Bids shall be accompanied by security meeting the requirements of the State of Montana in the amount of 10% of the total bid. The successful bidder will furnish approved Performance Security and Labor and Material Security in the amount of 100% of the contract.

The contractor shall comply with all fair labor practices and state statutes.

Each bidder and subcontractor for work over \$5,000 must have a valid Montana Public Contractor's License in the proper classification.

No bidder may withdraw his bid for at least 30 days after the scheduled time for receipt of bids except as noted in the Instruction to Bidders.

The Owner reserves the right to reject any or all bids and to waive any irregularities or informalities.

Fashioning a "Narrowly Tailored" MBE Program Under Richmond v. Croson

By Ralph C. Thomas, III

In the case of *Richmond v. Croson*, it will be remembered, the U.S. Supreme Court struck down a city ordinance in Richmond, Virginia which required prime contractors on city construction projects to meet a 30 percent minority business enterprise (MBE) subcontracting goal for each contract.

The Court ruled that the city's MBE utilization plan was unconstitutional because Richmond did not show a "compelling government interest" for adopting the race-conscious program, nor did it adequately demonstrate "strong evidence of past discrimination" against minority contractors in the local construction industry. The Court referred to testimony from the Richmond City Council hearing which preceded the passage of the ordinance as "general and conclusory" evidence. The Court further ruled that the Richmond MBE plan was not "narrowly tailored" to remedy the perceived problem.

This article discusses the development of a "narrowly tailored" program. Nothing in this article should be perceived as legal advice; it is presented to clear the confusion of how state and local entities can continue to include minority businesses in their procurement systems.

To comply with the recent U.S. Supreme Court ruling in *Richmond v. Croson*, states and localities desiring to establish or retain minority business utilization programs will have to do more than just demonstrate strong evidence of discrimination against specific minority groups in the local construction industry. Such jurisdictions will also have to show that the race-conscious programs they adopt as a result of such evidence are "narrowly tailored" to remedy the problem caused by discrimination.

In *Croson*, the Court gave five reasons why it felt that the City of Richmond's minority business utilization plan was not "narrowly tailored":

The plan applied to minority races upon which no evidence of discrimination had been shown.

The city did not consider using alternative, race-neutral means to increase minority participation in city contracting.

The plan's minority subcontracting goal of 30 percent (actually called a "rigid quota" by the Court) had no rational basis.

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The plan did not provide an adequate "waiver" provision.

While the disparity was found in MBE prime contracting, the plan called for remedial action in MBE subcontracting.

Thus, after an entity has gathered, developed and presented the requisite evidence necessary to establish a race-conscious remedial program, it must assure that it has addressed the Court's concerns in all of the above areas.

Lesser Restrictive Race-Neutral Alternatives

In Croson, the Court criticized Richmond for not having first "considered" race-neutral alternatives to the city's minority business enterprise utilization plan. The Court gave the following examples of such "race-neutral" actions:

- 1) relaxation of bonding requirements;
- 2) city financing for small firms;
- 3) simplified bidding procedures; and
- 4) financial aid for disadvantaged entrepreneurs of all races.

It is important to note that the Court only requires that a jurisdiction consider--not necessarily adopt--race-neutral alternatives. This is indeed fortunate, since all of the Court's suggestions are either impractical, ineffective or unworkable. Such suggestions indicate that the Court was not presented sufficient evidence by Richmond to better understand the extent to which past racial discrimination has stymied the development of minority contractors in the construction industry.

Because the Court requires the consideration of race-neutral alternatives, however, states and localities will have an excellent opportunity to explain how past discrimination in the industry was so profound that alternatives to race-conscious programs are largely ineffective. Moreover, most jurisdictions will find that their minority business utilization programs are already a last alternative. Research by this author has uncovered no jurisdiction in the United States, past or present, where minority contractors have achieved a proportionate share of a local construction market utilizing only "race-neutral" actions.

Despite the above realities, however, a jurisdiction should approach the task of considering alternatives with due care and seriousness in order to legally defend its ultimate race-conscious program. Predominantly white trade associations will fill the public hearings with various "race-neutral" suggestions as so-called "alternatives" to race-conscious set asides and/or goals. If the necessary fact-finding to justify the race-conscious program has been done properly, however, such suggestions should be able to be considered and discounted

without too much trouble.

Relaxation on Bonding Requirements

Without a doubt, the inability to obtain adequate surety bonding is the biggest obstacle between minority contractors and economic parity in the construction market. A bond is a guarantee made by a third party (usually a surety or an insurance company) to the owner or a prime contractor in a construction project that the contractor will complete the job in a satisfactory manner. Moreover, the third party's bond assures the owner that the job will be completed on time, within budget and that all of the contractor's subs and suppliers will be paid for their services and goods.

The main criteria a surety company considers in making the decision to write or not write a bond are the contractor's track record and its current financial condition. Almost all bonds written today by surety companies on construction contracts are for majority contractors. Although it is currently difficult for most small contractors to get bonds, minority contractors are disproportionately affected. Because of historical discrimination against minorities in the construction industry, minority contractors did not have the opportunity to either build long term track records or develop the necessary financial bases in the same economic proportion as white contractors. Thus, when attempting to compete with their white counterparts for bonds today, minority contractors are at an extreme disadvantage.

There is even some evidence of present discrimination by surety companies against minority contractors who do have the requisite track record and financial condition to qualify for bonds.

All of this is not to preclude the existence of minority contractors today who regularly receive bonds. However, the overwhelming majority of minority contractors do not get sufficient bonding. This prevents them from getting a meaningful share of the construction market.

This analysis is very important because the Supreme Court's entire rationale for suggesting the "relaxation of bonding requirements" as a "race-neutral" alternative to race-conscious set asides was based on the erroneous notion that the problem of inadequate bonding was unrelated to discrimination in the construction industry.

The Court correctly noted that the inability to obtain bonding is one of the impediments that prevents minority contractors from breaking into the construction industry. What the Court incorrectly assumed, however, is that the relaxation of bonding requirements would help to resolve the dilemma. This assumption is incorrect, for two reasons.

First, it should be noted that almost all government

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funded construction projects require that the contractor be bonded. In most cases, this requirement is imposed by state law. Thus, a state or local government entity wanting to ease bonding requirements by either raising the minimum threshold or by issuing waivers for certain projects would be in violation of state law.

Second, even if a state or local government could legally relax bonding requirements, it would not help minority contractors to develop and grow in the construction market. This is due to the fact that most surety companies do not consider construction jobs performed without a bond as part of a contractor's performance track record.

Although the relaxation of bonding requirements may give more minority contractors a better chance at performing small construction jobs, this alternative would not assist them in moving into the larger construction mainstream. Surety companies would simply have a more documented excuse of why they cannot bond minority contractors.

City Financing for Small Firms

The Court mentioned the lack of access to capital as another possible "race-neutral" reason why minority contractors get a disproportionately low share of local government contracts, at least in Richmond. The Court then suggested that this was a common problem among all small contractors and that perhaps the city could develop a financing program open to all such firms. Once again, it appears that the Court is basing its simplified solution upon faulty and incomplete evidence.

Financing is very important to minority contractors as well as to construction contractors in general. Winning a \$2 million contract, for example, is only half the battle. Since a contractor is only paid after certain phases of a project are satisfactorily completed, financing is necessary for up-front costs (which can be as much as \$600,000 on a \$2 million job) as well as costs which become due while the contractor is awaiting payment from the owner. Without adequate financing, it is next to impossible to satisfactorily perform construction projects of any meaningful size.

Adequate financing, like bonding, has all but eluded minority contractors. Recent studies suggest that the problem is very race-conscious. The 1987 State of Small Business report plainly stated that financial institutions discriminate against minority entrepreneurs. The report further stated that blacks are the primary victims of such discrimination.

A recent federal government study performed by the Federal Home Mortgage Administration (FHMA) showed widespread discrimination in the national home mortgage market, indicating that high-income blacks were turned

down for loans at the same rate as low-income whites.

Moreover, the Department of Justice is currently investigating evidence of loan discrimination by financial institutions against blacks in the city of Atlanta.

It is important for states and localities to obtain the research methods used in the above studies to determine the presumption of discrimination in lending so that they can duplicate these studies in their own jurisdictions. Even the national studies might be broken down to indicate specific evidence of discrimination in specific states and localities.

The "race-neutral" alternative of "city financing for all small entrepreneurs," as the Court has suggested, is ineffective. Because all small entrepreneurs would be eligible to participate in such a program, it is unlikely that a significant number of minority contractors (already in a financially disadvantaged position due to past and present discrimination) would be able to utilize the program and meaningfully increase minority participation in government construction contracting.

Simplified Bidding Procedures

In many cases, state and local procurement agencies develop construction project bid packages that are so large and complicated that minority contractors are discouraged from bidding.

In an ideal situation, a government procurement office will invite contractors to bid on projects in which the government states as specifically as possible what it wants constructed, and how and when. The interested contractor then determines how he or she can perform the project at the least cost. After determining the costs for labor, overhead, materials and profit, the contractor submits a "bid," or offer, to the government in which he states the price at which he or she can perform the entire job. This process would generally be described as a "simplified bidding procedure."

In many instances, however, state and local governments make this procedure more complex and cumbersome. One procedure is the unit price contracting system, whereby the government agency requires the contractor to submit a separate bid for each item of work needed to perform the project including the costs of labor, materials, overhead and profit.

Another complex bidding procedure sometimes utilized by state and local procurement agencies is the alternate items process. In this procedure, the contractor must submit a bid for a project which not only entails the items required by the project specifications, but which also includes bids for "alternate" items.

For example, if a city requests bids for the construction of a building with an asphalt shingle roof, the contractor must also submit bids utilizing alternate items than

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those requested, e.g., the cost of the building with a metal roof. Under this method, a contractor could submit the lowest base bid but still lose the contract because of higher bids on alternate items.

A similar bidding method involves the submission of not only a base bid but also a substitute sheet. In this scenario, the bidder "voluntarily" lists lower cost substitute items on the sheet. The idea is for the contractor to demonstrate to the owner that the project can still be efficiently completed at a lower cost by using other suitable materials.

All the above mentioned bidding systems are complex and require that the contractor have very knowledgeable and experienced estimators. These procedures cause no problem for those contractors who have been in the system from the ground floor and who have literally grown up with the process. However, minority contractors are seldom included in this circle, and have only recently been allowed to participate in government construction contracting. They often do not have the experience, technical skills or business connections to effectively compete against the existing, larger white contractors in this complex bidding arena.

In *Richmond v. Croson*, the Supreme Court intimated that complicated, cumbersome bidding procedures are also unfair to small white contractors; perhaps if a jurisdiction simplified bidding procedures for all contractors, minority participation in government construction contracting would increase.

While consistent, uniform and standard rules for bidding on state and local government contracts would certainly make for a fairer system, they would not do much to increase minority participation in prime contracting. What the Court seriously overlooked was that most minority contractors are subcontractors, not primes.

Racial discrimination in the subcontracting arena has been so profound that only a minimal number of minority contractors have been able to become primes. Assuming that simplified bidding procedures could realistically be implemented, only a few would be able to benefit.

Financial Aid for "All" Disadvantaged Entrepreneurs

The Court's final suggestion for a less restrictive, race-neutral alternative to minority set asides was the establishment of a financial aid program for "disadvantaged" entrepreneurs of all races.

This alternative has two very major flaws. First, the Court was not quite clear on the type of financial aid program it was suggesting. The term "financial aid" would seem to indicate the bestowing of money on an entrepreneur that would not have to be paid back. It can

safely be assumed that this is what the Court had in mind, due to the fact that it had previously suggested city financing for all small firms.

The Court's suggestion, however, is presumptuous. It assumes that states and localities have the budget as well as the inclination to embark upon such programs. For many states and localities, fiscal and budgetary restraints will prevent them from adopting such programs, not to mention the political considerations. Jurisdictions should readily document such facts in the record.

Aside from the above, the Court's alternative has a more serious problem. How would a government entity define a "disadvantaged" contractor in a race-neutral manner? The U.S. Small Business Administration's 8(a) set aside program exists for those companies which are owned and controlled by socially and economically disadvantaged individuals. Under this program, however, certain minority groups (Blacks, Hispanics, Asian-Pacifics and American Indians) are presumptively considered disadvantaged, based upon congressional finding of past discrimination against these groups in America's business and commercial markets.

A financial aid program for disadvantaged contractors of all races, then, merely begs the question. Fact-finding investigations would have to be conducted to determine who was disadvantaged and why. Rarely has an entrepreneur been found to be "disadvantaged" for reasons other than belonging to a race or gender that has suffered from past discrimination.

Narrowing Set Asides to Affected Minority Groups

In *Croson*, the Court made much of the fact that the Richmond city ordinance entitle "a Black, Hispanic or Asian entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race," even though there was no evidence of discrimination against non-Black minorities in the city. Needless to say, a jurisdiction should narrow the applicability of its set asides to only those minority groups to which strong evidence of discrimination has been shown in the fact-finding investigation.

Some jurisdictions may feel that because the Supreme Court criticized Richmond's MBE plan for applying to minorities across the board, and from "anywhere in the country," that new set aside programs will have to be limited to local minority contractors. This assumption is not, however, necessarily correct.

Where a jurisdiction's fact finding investigation has shown that Blacks, as a group, have been victims of racial discrimination within that jurisdiction's construction industry, the remedial program should apply to all Black contractors who desire to do business within the jurisdiction.

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tion. Logically, if a history of discrimination has been established against blacks in Richmond, Virginia, for instance, it is extremely doubtful that the perpetrators of such discrimination would care whether the Black was from Richmond, Los Angeles or Duluth, Minnesota. The target is Blacks in general, not just local Blacks.

For the more cautious minded jurisdictions, however, the program might be limited to affected minority groups who are domiciled within the geographic radius of the local jurisdiction's competitive market. In Washington, D.C., for example, minority contractors from Maryland and Virginia regularly compete for local government business in the capital city.

Moreover, a program could be even more narrowly tailored by having it only apply to minority contractors based in the specific jurisdiction where discrimination has been found. However, this kind of plan would not achieve its desired results in cities and counties where very few of the minority contractors who do work in a particular jurisdiction actually live there as well. This problem could be overcome by requiring outside minority contractors desiring to do business in a particular jurisdiction to establish an office address there.

Numerical Goal/Set Aside

The Court faulted the Richmond plan for not providing a better rationale for its 30 percent subcontracting goal. The Court was not impressed by Richmond's comparison of a 0.67 percent rate of Black participation in city construction contracting to the city's 50 percent black population rate. The Court stated that the 30 percent figure "rests upon the completely unrealistic assumption that minorities will choose to enter construction in lock step proportion to their representation in the local population." The Court suggested that a better statistical comparison would be the percentage of minority participation in local government contracting to the percentage of available minority contractors within the local jurisdiction.

Unfortunately, the Court's suggestion will not yield fair results in all situations. In some construction specialties, there are almost no available minority contractors due to past racial exclusionary practices. In this case, it is suggested that the numerical goal be set by determining the comparable percentage of white contractors in a given field. For example, if sheet metal contractors are nine percent of the white population in a given geographic market, it would not seem unreasonable that Blacks would not have an equal percentage of its local population as sheet metal contractors absent discrimination assuming, of course, that ample evidence of discrimination has already been demonstrated in the fact-finding study.

It should be understood, however, that there is no

single statistical model for determining a numerical set aside or goal figure. It appears that the Court will accept any figure that has a rational basis.

In conjunction with this, the plan should also be for limited time periods, allowing for program review and revision. Goals may have to be raised or lowered depending upon their effectiveness.

Prime Contracting vs. Subcontracting

The Supreme Court questioned the motivation behind the Richmond plan because, although the evidence indicated less than one percent Black participation in prime city contracts, the plan directed the 30 percent only to subcontracting.

What most likely happened is that Richmond was aware that it did not have enough available minority prime contractors in its local jurisdiction to significantly impact the city's prime construction market and was hoping that through a subcontracting program its small contractors would eventually grow into primes. However, as far as the Court was concerned, Richmond's problem was that it had nothing in the record to justify its actions.

For the jurisdiction that holds the proper fact finding investigation, this should not be a problem. The record would clearly establish that most primes are made, not born. Well financed and adequately bonded companies are the result of a series of satisfactorily completed small to medium to large contracts. However, this conclusion should be based upon well reasoned, supportable facts pulled from the underlying record justifying the jurisdiction's program. At least one jurisdiction, the City of San Francisco, plans to have two MBE programs, one affecting prime contracting and the other affecting subcontracting.

The "Waiver" Provision

The City of Richmond allowed waivers to its 30 percent subcontracting requirement when a prime contractor could show that sufficient MBEs were either unwilling or unavailable to meet the goal. The Court, however, ruled that this was not enough.

Apparently, the Court was concerned about the prime contractor's administrative remedy in the case of an artificially priced high bid by a minority contractor who knows he is the only bidder available in a given project. The Court held that there had to be a system in place which could determine on a case-by-case basis whether or not the MBE's high bid was the result of it's being a victim of discrimination. Ironically, in the Richmond v. Croson case, both Croson, the white contractor, and the proposed MBE used the same supplier to quote prices in their bids. The supplier gave the MBE a much higher

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price than it gave Croson for the same materials on the same job.

To resolve such dilemmas, a jurisdiction should implement procedures which provide for a prompt administrative appeal of a denied MBE waiver before a high level administrative authority within a given governmental department. The appeal procedure should set guidelines for the determination of the real reason a minority contractor has submitted a higher bid than that of white contractors for a given job. This should substantially satisfy the Court's concerns.

The Richmond decision seeks to make state and local minority business set aside programs specific in nature, limited in applicability and rational in fact. Because the factual record in *Richmond v. Croson* is so void of information about the construction industry in general and historical discrimination against minorities in particular, the Court was led to make many erroneous assumptions and faulty conclusions in attempting to work out a fair system.

The only real solution to this problem is for states and localities to build detailed, factual records when establishing their race-conscious remedial programs. If the program shows the required research, evidently development and rational basis, it can only be assumed that such a program will pass the "strict scrutiny" of the courts.

Ralph C. Thomas, III is the executive director of the National Association of Minority Contractors (NAMC).

Excerpt from the September-October 1989 MBE.

WORKFORCE 2000

A serious shortage of skilled labor possible by the year 2000; industry leaders plan solutions through training, recruitment

In the year 2000, will there be enough skilled construction workers to go around?

That's a question being asked a lot in the construction industry. Already, many skilled crafts are coming up short. To ensure an adequate supply of qualified workers in the future, construction industry leaders -- locally and nationally are working now to train young workers and sell construction as viable employment.

Workforce 2000, a non-profit coalition of national construction industry organizations, formed in April of this year to address the possible shortage and what's causing it. Among the 30 industry organizations represented in Workforce 2000 are the American Subcontractors Association, Associated Builders and Contractors, Associated General Contractors of America and Associated Specialty Contractors.

"The need for a qualified workforce cuts across the industry, without regard to the size or type of company," commented former ASA president M. R. "Mac" Sullivan, Jr. "That's why we expect to have extensive participation in the foundation."

Workforce has conceived a four-point strategy that focuses on image, recruitment, productivity and training.

The construction industry's image, reports Workforce 2000, needs improvement. To successfully recruit young workers, the industry's opportunities for decent wages and advancement must be positively presented.

Recruitment, the organization adds, is best accomplished through a one-on-one process at the local levels. Workforce encourages local contractors and associations to develop recruitment programs in their areas.

Increased worker productivity is the ultimate goal, continues Workforce 2000. With qualified workers, contractors can achieve high productivity levels and compensate for the shrinking workforce.

Once greater numbers of qualified workers are attracted to the field, the industry must be prepared to effectively train them, Workforce adds. The organization plans to develop a national training criteria and wants employers, government and local associations to implement the training.

The need for qualified workers is increasing. According to a national poll by Management Recruiters, 51 percent of construction executives planned to increase their professional staffs during the last half of 1989; and the planned new hiring exceeded the national average by 39 percent. The survey further revealed that 38 percent of contractors planned to maintain their staffs, and only 10 percent planned staff reductions.

Excerpt from the September-October 1989 MBE.

Tenative Highway Construction Program For First Six Months Of 1990

The following list of tentative highway projects is from the State of Montana Department of Highways Tenative Construction Program dated 10/31/89. Projects are listed by district, number and name, type of work and date.

The types of work shown are very broad. In general, the largest DBE subcontracting opportunities are in the projects that have plant mix surfacing or PMS overlay.

When the monthly Invitation to Bid and plans are released, more specific information on work items will be available. Projects are frequently postponed, accelerated or cancelled so a double-check of this information with the MDOH Contract Plans Section is recommended.

HWY Constr. Program, continue on page 12

MONTANA DEPARTMENT OF HIGHWAYS
TENTATIVE CONSTRUCTION PROGRAM

JAN 1990 THROUGH JUNE 1990

DIST. FINANCE /ADMIN	PROJECT NUMBER	LOCATION	TYPE OF WORK	LETTING DATE	
				YEAR	MONTH
5	RS 314-1()26	BUSBY - S. (N. SECTION)	GRADING	90	1
2	RS 540-1()2	DEEP CR. BRIDGE - N.	GRADING	90	1
5	CB-RS 314-1()18	BUSBY - S. (S. SECTION)	GRADING	90	1
1	F 6-1()50	THOMPSON FALLS - E. & W.	GRADING	90	1
5	RS 314-1()26	BUSBY - S. (N. SECTION)	GRAVEL SURFACING	90	1
1	F 6-1()50	THOMPSON FALLS - E. & W.	GRAVEL SURFACING	90	1
2	RS 540-1()2	DEEP CR. BRIDGE - N.	GRAVEL SURFACING	90	1
5	CB-RS 314-1()18	BUSBY - S. (S. SECTION)	GRAVEL SURFACING	90	1
2	RS 540-1()2	DEEP CR. BRIDGE - N.	PIPE	90	1
1	F 6-1()50	THOMPSON FALLS - E. & W.	PLANT MIX SURFACING	90	1
5	RS 314-1()26	BUSBY - S. (N. SECTION)	PLANT MIX SURFACING	90	1
2	RS 540-1()2	DEEP CR. BRIDGE - N.	PLANT MIX SURFACING	90	1
5	CB-RS 314-1()18	BUSBY - S. (S. SECTION)	PLANT MIX SURFACING	90	1
4	F-BRF 32-1()6	MACON - N.	PMS OVERLAY	90	1
4	F 1-8()467	MALTA - W.	PMS OVERLAY	90	1
1	F 6-1()46	THOMPSON FALLS - WEST	PMS OVERLAY	90	1
5	HES 4141()	VARIOUS LOCATIONS - BILLINGS	SIGNAL MODIFICATIONS	90	1
4	BRF 42-3()73 U1	MILK R. - S. OF GLASGOW	STRUCTURE	90	1
1	IR 90-1()23	ST. REGIS	STRUCTURE	90	1
4	F-BRF 32-1()6	MACON - N.	STRUCTURE	90	1
1	F 6-1()46	THOMPSON FALLS - WEST	WIDEN	90	1
1	F 6-1()50	THOMPSON FALLS - E. & W.	WIDEN	90	1
4	F-BRF 32-1()6	MACON - N.	WIDEN	90	1
4	F 1-9()526	GLASGOW - W.	PMS OVERLAY	90	2
5	RS 308-1()1	BEARCREEK SLIDE	SLIDE CORRECTION	90	2
1	BR 9020()	MIDDLE FORK ROCK CR.	STRUCTURE	90	2
1	BR 9020()	WEST FORK ROCK CR.	STRUCTURE	90	2
4	F 1-9()526	GLASGOW - W.	WIDEN	90	2
2	IR 15-3()143	ELK PARK - BOULDER	EROSION CONTROL	90	3
3	F 24-3()109	BOWMAN'S CORNER	FLASHERS	90	3
5	F-FLH-BRF 37-1()9	BUSBY - WEST	GRADING	90	3
5	F-FLH-BRF 37-1()9	BUSBY - WEST	GRAVEL SURFACING	90	3
1	HES 4141()	3 LOCATIONS S OF TROY	GUARDRAIL	90	3
5	F-FLH-BRF 37-1()9	BUSBY - WEST	PIPE	90	3
5	F-FLH-BRF 37-1()9	BUSBY - WEST	PLANT MIX SURFACING	90	3
4	F 57-7()297	LINDSAY - E & W	PMS OVERLAY	90	3
2	IR 15-3()143	ELK PARK - BOULDER	PMS OVERLAY	90	3
3	F 24-3()109	BOWMAN'S CORNER	SIGNING	90	3
1	HES 4141()	3 LOCATIONS S OF TROY	SLOPE FLATTENING	90	3
4	RS 438-1()25	25 MI N OF NASHUA-N	GRADING	90	4
4	RS 438-1()25	25 MI N OF NASHUA-N	GRAVEL SURFACING	90	4
5	IR 90-9()543	WYOLA-WYOMING LINE	MILL	90	4
4	RS 438-1()25	25 MI N OF NASHUA-N	PLANT MIX SURFACING	90	4
5	IR 90-9()543	WYOLA-WYOMING LINE	PMS OVERLAY	90	4

3	RTF 67-1()0	SHELBY-NW	PMS OVERLAY	90	4
4	F 20-2()50	SIDNEY - SW	PMS OVERLAY	90	4
3	F 1-4()279	MAIN ST. SHELBY	PMS OVERLAY	90	4
1	F 5-2()93	S OF LAKESIDE	SLIDE CORRECTION	90	4
2	BRS 205-1()1	THREE FORKS - E	STRUCTURE	90	4
5	BRS 419-1()4	W ROSEBUD CR. & OVERFLOW	STRUCTURE	90	4
5	BR 9049()	YLWSTNE R SE OF GREYCLIFF	STRUCTURE	90	4
2	BRS 205-1()1	THREE FORKS - E	STRUCTURE	90	4
1	RS 260-1()0	LIBBY - NW	GRADING	90	5
3	RS 228-2()30	5 MI S OF FORT BENTON - S	GRADING	90	5
1	RS 260-1()0	LIBBY - NW	GRAVEL SURFACING	90	5
2	RS 284-3()16	BROADWATER CO. LINE - SE	GRAVEL SURFACING	90	5
3	RS 228-2()30	5 MI S OF FORT BENTON - S	GRAVEL SURFACING	90	5
1	RS 260-1()0	LIBBY - NW	GRAVEL SURFACING	90	5
1	RS 260-1()0	LIBBY NW	PLANT MIX SURFACING	90	5
2	RS 284-3()16	BROADWATER CO. LINE - SE	PLANT MIX SURFACING	90	5
2	RS 284-3()16	BROADWATER CO. LINE - SE	PLANT MIX SURFACING	90	5
4	F 20-1()0	GLENDIVE - NE	PMS OVERLAY	90	5
1	F 24-1()0	BONNER - W	PMS OVERLAY	90	5
2	F 46-7()68	E. OF WISE RIVER	ROCK REMOVAL	90	5
2	RS 284-3()16	BROADWATER CO. LINE - SE	SEAL & COVER	90	5
1	F 7-1()47	S EDGE OF HAMILTON-GOLF C.RD	SIGNALS	90	5
1	F 7-1()48	FAIRGROUND RD. - HAMILTON	SIGNALS	90	5
5	BR 9056	YELLOWSTONE R E OF MOSSMAIN	STRUCTURE	90	5
2	BRF 29-1()50	JEFFERSON R N OF TWIN BRDGS	STRUCTURE	90	5
4	BRF 42-3()73	MILK R - S OF GLASGOW	GRADING	90	6
5	RTF-BRF 16-1()12	BILLINGS - N	GRADING	90	6
2	M 1816(0)	ELIZABETH WARREN - BUTTE	GRADING	90	6
3	RTF-BRF 10-2()73	BIG SANDY - N & S	GRADING	90	6
2	M 1816(0)	ELIZABETH WARREN - BUTTE	GRAVEL SURFACING	90	6
3	RTF-BRF 10-2()73	BIG SANDY - N & S	GRAVEL SURFACING	90	6
5	RTF-BRF 16-1()12	BILLINGS - N	GRAVEL SURFACING	90	6
1	F 1-2()134	COLUMBIA FALLS - E & W	PAVEMENT MARKING	90	6
5	F-BRF 63-2()19	JUDITH GAP - N	PIPE		
5	RTF-BRF 16-1()12	BILLINGS - N	PIPE	90	6
4	F-BRF 42-3()59	FORT PECK - GLASGOW	PIPE	90	6
3	RTF-BRF 10-2()73	BIG SANDY - N & S	PLANT MIX SURFACING	90	6
4	BRF 42-3()73	MILK R - S OF GLASGOW	PLANT MIX SURFACING	90	6
5	RTF-BRF 16-1()12	BILLINGS - N	PLANT MIX SURFACING	90	6
2	M 1816(0)	ELIZABETH WARREN - BUTTE	PLANT MIX SURFACING	90	6
5	F-BRF 63-2()19	JUDITH GAP - N	PMS OVERLAY	90	6
5	F 16-1()22	17 MI N OF BILLINGS - N	PMS OVERLAY	90	6
4	F 23-2()108	HAMMOND - SE	PMS OVERLAY	90	6
4	F-BRF 42-3()59	FORT PECK - GLASGOW	PMS OVERLAY	90	6
5	RTF 61-3()34	GRASSRANGE - N & S	PMS OVERLAY	90	6
1	RTF 52-1()4	BLUE BAY - N & S	PMS OVERLAY	90	6
1	F 1-1()0	TROY - W	PMS OVERLAY	90	6
5	IR 90-8()453	LOCKWOOD - PINE HILLS INTC	PMS OVERLAY	90	6
1	BR 9041()	E FORK BITTERROOT R.	STRUCTURE	90	6
3	RTF-BRF 10-2()73	BIG SANDY - N & S	STRUCTURE	90	6
1	BHF 1-1()6	NW OF TROY	STRUCTURE	90	6
4	F-BRF 42-3()59	FORT PECK - GLASGOW	WIDEN	90	6
4	F 23-2()108	HAMMOND - SE	WIDEN	90	6
1	F 1-1()0	TROY - W	WIDEN	90	6
5	F-BRF 63-2()19	JUDITH GAP - N	WIDEN	90	6

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